

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,**

DARRYL ANDERSON, et al.,

Plaintiffs,

v.

PERDUE FARMS , INC.,

Defendant.

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**CIVIL ACTION NO.
1:06-cv-01000-MEF-WC**

**PLAINTIFFS' MOTION TO QUASH NOTICES OF DEPOSITION
AND STAY DISCOVERY PENDING THE COURT'S DECISION ON
PLAINTIFFS' MOTION FOR COURT SUPERVISED NOTICE**

Plaintiffs move this Court to quash the below referenced notices of deposition and move this Court to stay discovery in this case until the Court rules on Plaintiffs' Motion for Court Supervised Notice. In support of this motion, Plaintiffs show the following:

1. This action was filed on November 3, 2006.
2. After conferring with Defendant's counsel and receiving clarification regarding Defendant's pay practices in light of their May 9, 2002 settlement with the Department of Labor, pre *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005), Plaintiffs amended their Complaint on July 5, 2007, to accurately reflect Defendant's pay practices and to modify damages sought limiting

damages to the last two years dating back to October 31, 2004 instead of the last three years and withdrawing claims of willfulness thereby eliminating claims for liquidated damages.

3. In response to Defendant serving written discovery requests, on September 9, 2007 Plaintiffs served upon Defendant 181 sets of discovery responses for named and opt-in plaintiffs.

4. Plaintiffs filed their Motion for Court Supervised Notice on November 5, 2007.

5. Consistent with Plaintiffs' request that the Court not permit Defendant a period of time for discovery in order to file their response¹, on November 13, 2007 the Court entered an order setting deadlines requiring Defendant to file their response to Plaintiffs' notice motion by November 26, 2007.

6. Defendant requested Plaintiffs agree to an extension for Defendant to respond to the notice motion in order that Defendant may depose plaintiffs who provided declarations in support of Plaintiffs' motion.

7. November 13, 2007 via phone conversation, Plaintiffs denied Defendant's request for an extension citing *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F .3d 1208, 1219 (11th Cir. 2001), stating at this stage, the

¹ See Plaintiffs' Motion for Court Supervised Notice, Dckt. 49, Section E, Discovery as it Relates to Conditional Certification.

conditional certification stage, the Court should base its decision solely on pleadings and affidavits and as such Defendant can submit their own affidavits in support of their response, same as Plaintiffs. Furthermore, Plaintiffs pointed out that if the Court had contemplated allowing Defendant an opportunity to conduct additional discovery it would have allowed Defendant a greater period of time in which to have their Response filed.

Defendant's stated reason for needing the deposition testimony was the fact that Plaintiffs' declarations supporting their notice motion were similar in form and content and thus in their opinion lacked evidentiary value. Plaintiffs informed Defendant that this Court has been fully briefed on notice in three other pending FLSA poultry cases, two involving Wayne Farms LLC and one involving the Equity Group Eufaula Division, and in all three cases identical declarations were submitted and the Court did not raise issue with the declarations nor did the Court order Defendant's be allowed time to conduct additional discovery in order to respond to the notice motions².

In fact, this Court found in *Burks et al. v. Equity Group Eufaula Division, LLC*, the 52 identical affidavits filed in support of plaintiffs'

² See *Burks, et al. v. Equity Group Eufaula Division*, 2:06-cv-01081-MEF; *Adams et al. v. Wayne Farms, LLC*, 1:06-cv-00950-MEF; *Anderson et al.s v. Wayne Farms, LLC*, 2:06-cv-00951-MEF

notice motion and more than 180 opt in plaintiffs was ample evidence that other employees wish to opt-in to the case. Dckt. 49 at 2-3. Furthermore, the Court found those same 52 identical affidavits established employees were similarly situated for purposes of conditional certification in that they all worked at the same plant, were subject to the same compensation policies that are subject of this suit with the same or similar job duties and they all seek damages under the same legal theory. Likewise, under the same theory Judge Proctor and Judge Johnson ordered notice in two FLSA poultry cases where identical affidavits were submitted in support of notice.³ As such, in this action, Plaintiffs have submitted similar evidence in support of their notice motion; therefore Defendant's requested depositions are not necessary for Defendant to file a response.

8. Plaintiffs assert Defendant's need to depose declarants is no doubt related to Defendant's desire to impugn declarants' affidavit testimony or somehow show declarants were misinformed as to what was signed. But as the court in *Scott v. Heartland Home Finance, Inc.* concluded, it is not necessary at this stage the conditional certification stage to make credibility determinations or resolve factual issues. 2006 WL 1209813 *3 (N.D.Ga).

³ See *Belue et, al v. Wayne Farms, LLC*, 4:06-cv-02095-RDP, Dckt, 22 Order on Notice, and *See Bolden, et al. v. Wayne Farms, LLC*, 5:06-cv-02096-IPJ, Dckt. 18 Order on Notice.

The *Scott* Court recognized defendant's attacks on plaintiffs were effectively an attack on the merits of the claims finding the "court need not evaluate the merits of plaintiffs' claims in order to determine whether the similarly situated group exists". *Id.* Similarly, the court in *Kreher v. City of Atlanta, Ga*, 2006 WL 739572, at 84 (N.D.Ga. March 20, 2006) found in determining the appropriateness of notice, there is no need for the Court to address the merits of plaintiffs' claims in order to determine whether a similarly situated group exists, quoting *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 55 (S.D.N.Y. 2005).⁴

9. Unsuccessful in their attempt to obtain an extension to conduct additional discovery, Defendant then requested Plaintiffs agree to an extension based on Defendant's conflict in another court in Georgia, reminding Plaintiffs Defendant had been courteous in granting Plaintiffs additional time to respond to their discovery requests and that the Court

⁴ See *Barrus v. Dick's Sporting Goods, Inc.*, 465 F. Supp.2d 224, 230 (W.D.N.Y. 2006) (The court describes defendants response to notice in the form of affidavits from current employees which challenge many of the observations and conclusions contained in the affidavits of former employees submitted by plaintiffs to be misplaced at this juncture... The court states the affidavits were undoubtedly intended to attack the veracity and credibility of the former employees and found, "It is not the Court's role to resolve factual disputes, decide substantive issues going to the ultimate merits or make credibility determinations at the preliminary certification stage of an FLSA collective action. See *Kalish v. High Tech Institute, Inc.* 2005 WK 1073645, *2 (D.Minn. April 22, 2005) (so long as a "colorable basis" for the claim exists, court need not make any credibility determinations at the initial FLSA certification stage).

likely would grant an extension even if we opposed. In *Alford v. Perdue Farms, Inc.*, 5:07-CV-0087, Defendant had a response to a motion for notice due December 4, 2007, with plaintiffs' reply due January 11, 2008, and the expectation of a hearing being set shortly thereafter. As such, Plaintiffs obliged agreeing to extend Defendant's deadline to respond until January 14, 2008 to accommodate their conflict.

10. Subsequently, in an attempt to resolve the case in its entirety, November 21, 2007 Plaintiffs provided Defendant a written offer to settle the claims of the named plaintiffs and opt-in plaintiffs, thus avoiding the need to address notice and alleviate the dispute over discovery.

11. On December 5, 2007, Defendant in an email requested Plaintiffs reconsider and agree to a deposition schedule so they can obtain testimony of plaintiffs in support of their response to Plaintiffs' notice motion. Defendant further threatened to file a motion to compel and to seek an award of costs and expenses associated with the motion.

12. December 11, 2007 Defendant formally declined to extend a counter offer to settle the litigation.

13. As such, the morning of December 14, 2007, Plaintiffs and Defendant conferred in good faith and were unable to agree on how discovery should

proceed as it relates to Defendant's Response. Plaintiffs' counsel conveyed to Defendant that the issue is not ripe for the Court to address the dispute until deposition notices have been served.

14. December 14, 2007, Defendant served upon Plaintiffs via email eight (8) notices of deposition for decalarants: Cornelia Thornton, Gwendolyn Lee, Donne Neal, Regina Whitfield, Thaya Smith, Diane Wiggins, Norva Baxter and Elisha Jackson, attached as Exhibit A.

15. Plaintiffs request the Court enter an Order quashing these deposition notices.

16. Plaintiffs notified Defendant on Monday, December 17, 2007 that their position is unchanged and since deposition notices had been served that Plaintiffs will file a motion to quash the notices and stay discovery.

17. In deciding whether to stay a case, the Court "must weigh competing interests and maintain an even balance," and if there is even a fair possibility that the stay for which he prays will work damage to someone else," the movant "must make out a clear case of hardship or inequity in being required to go forward". *Landis v. North American Co.* 299 U.S. 248, 254-55 (1936).

18. Accordingly, no party will suffer damage or prejudice as a result of this brief stay in discovery because Defendant, the only individual who could claim such damage, is not denied any right or advantage by requiring it to proceed under *Hipp* and consistent with *Hipp* submit it's response and supporting affidavits and evidence without further discovery. Furthermore, as cited above, nothing is to be gained by Defendant's requested deposition testimony because at this stage the Court need not make factual determination, credibility determinations or determinations as to the merits of the case when deciding if court authorized notice is warranted. Thus an order briefly staying discovery is proper.

19. If this Court finds Defendant may in fact suffer damage, Plaintiffs contend the inequity and hardship suffered by Plaintiffs outweighs the damage suffered by Defendant and as such Plaintiffs Motion to Stay is warranted because:

- a. Defendant's request for depositions in support of their response will greatly delay these proceedings⁵. This action has already been before this Court more than a year.

⁵ Plaintiffs in *Alford v. Perdue Farms, Inc.*, 5:07-cv-0087, filed their Motion for Court Supervised Notice August 1, 2007. As a result of Defendant's similar request for deposition testimony in support of their notice response, a ruling on notice will have been

- b. Defendant's attempts to depose declarants exposes the parties and this Court to a slippery slope in which Plaintiffs may be forced to conduct additional discovery and depositions in response to Defendant taking declarants' depositions in order to file a rebuttal brief in reply to Defendant's response.
- c. Plaintiffs' will be subjected to duplicative discovery in that plaintiffs and corporate representative's as well as local management will be deposed for notice purposes and then again for purposes of certification and liability.
- d. Plaintiffs will have to bear the unnecessary burdensome cost of conducting said depositions when the need for such is not warranted at this stage, the conditional certification stage.

WHEREFORE, for these reasons, Plaintiffs request the entry of an Order quashing the aforesaid notices of deposition and staying discovery until the Court rules on Plaintiffs' Motion for Court Supervised Notice.

delayed almost 6 months by the time plaintiffs file their final reply brief. This delay is due to the natural conflicts of all parties and counsel as well as the need for plaintiffs to take their own depositions of corporate representatives, etc. in response to Defendant's depositions.

Dated: December 17, 2007

Respectfully submitted,

THE COCHRAN FIRM, P.C.

/s/ Robert J. Camp

ROBERT J. CAMP

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(205) 244-1115 (Phone)

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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2007, I electronically filed Plaintiffs' Motion with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to:

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Lance Harrison Swanner
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James J. Kelley
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Brian Z. Liss
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Samuel A. Cherry, Jr.
scherry@cochranfirm.com

/s/ Robert J. Camp

ROBERT J. CAMP

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION**

DARRYL ANDERSON, et al.,

Plaintiffs,

v.

PERDUE FARMS INCORPORATED,

Defendant.

Case Action No.:

1:06-CV-1000-MEF-WC

JURY TRIAL DEMANDED

NOTICE OF DEPOSITION

Defendant, Perdue Farms Incorporated, by and through its undersigned counsel, hereby notices the deposition of Cornelia Thornton for January 3, 2008, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Federal Place, Suite 1000, 1819 5th Avenue North, Birmingham, Alabama 35203. The deposition will commence at 9:00 AM before a court reporter and continue thereafter until completed.

Dated: December 14, 2007

Respectfully submitted,

/s/Brian Z. Liss

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Counsel for Defendant, Perdue Farms Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Notice of Deposition has been served upon Plaintiffs' counsel at the addresses set forth below by Brian Z. Liss, on this 14th day of December, 2007 via electronic mail on:

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/s/ **Brian Z. Liss**
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Counsel for Defendant Perdue Farms Incorporated

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION**

DARRYL ANDERSON, et al.,

Plaintiffs,

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PERDUE FARMS INCORPORATED,

Defendant.

Case Action No.:

1:06-CV-1000-MEF-WC

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NOTICE OF DEPOSITION

Defendant, Perdue Farms Incorporated, by and through its undersigned counsel, hereby notices the deposition of Gwendolyn Lee for January 3, 2008, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Federal Place, Suite 1000, 1819 5th Avenue North, Birmingham, Alabama 35203. The deposition will commence at 9:00 AM before a court reporter and continue thereafter until completed.

Dated: December 14, 2007

Respectfully submitted,

/s/Brian Z. Liss

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Counsel for Defendant, Perdue Farms Incorporated

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Defendant.

Case Action No.:

1:06-CV-1000-MEF-WC

JURY TRIAL DEMANDED

NOTICE OF DEPOSITION

Defendant, Perdue Farms Incorporated, by and through its undersigned counsel, hereby notices the deposition of Dionne Neal for January 3, 2008, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Federal Place, Suite 1000, 1819 5th Avenue North, Birmingham, Alabama 35203. The deposition will commence at 1:00 PM before a court reporter and continue thereafter until completed.

Dated: December 14, 2007

Respectfully submitted,

/s/Brian Z. Liss

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Counsel for Defendant, Perdue Farms Incorporated

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Counsel for Defendant Perdue Farms Incorporated

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
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PERDUE FARMS INCORPORATED,

Defendant.

Case Action No.:

1:06-CV-1000-MEF-WC

JURY TRIAL DEMANDED

NOTICE OF DEPOSITION

Defendant, Perdue Farms Incorporated, by and through its undersigned counsel, hereby notices the deposition of Regina Whitfield for January 3, 2008, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Federal Place, Suite 1000, 1819 5th Avenue North, Birmingham, Alabama 35203. The deposition will commence at 1:00 PM before a court reporter and continue thereafter until completed.

Dated: December 14, 2007

Respectfully submitted,

/s/Brian Z. Liss

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Counsel for Defendant, Perdue Farms Incorporated

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Plaintiffs' counsel by Brian Z. Liss, on this 14th day of December, 2007, via electronic mail on:

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Defendant.

Case Action No.:

1:06-CV-1000-MEF-WC

JURY TRIAL DEMANDED

NOTICE OF DEPOSITION

Defendant, Perdue Farms Incorporated, by and through its undersigned counsel, hereby notices the deposition of Thaya Smith for January 4, 2008, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Federal Place, Suite 1000, 1819 5th Avenue North, Birmingham, Alabama 35203. The deposition will commence at 9:00 AM before a court reporter and continue thereafter until completed.

Dated: December 14, 2007

Respectfully submitted,

/s/**Brian Z. Liss**

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JURY TRIAL DEMANDED

NOTICE OF DEPOSITION

Defendant, Perdue Farms Incorporated, by and through its undersigned counsel, hereby notices the deposition of Diane Wiggins for January 4, 2008, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Federal Place, Suite 1000, 1819 5th Avenue North, Birmingham, Alabama 35203. The deposition will commence at 9:00 AM before a court reporter and continue thereafter until completed.

Dated: December 14, 2007

Respectfully submitted,

/s/Brian Z. Liss

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Counsel for Defendant, Perdue Farms Incorporated

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Plaintiffs' counsel by Brian Z. Liss, on this 14th day of December, 2007, via electronic mail on:

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**Case Action No.:
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JURY TRIAL DEMANDED**

NOTICE OF DEPOSITION

Defendant, Perdue Farms Incorporated, by and through its undersigned counsel, hereby notices the deposition of Norva Baxter for January 4, 2008, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Federal Place, Suite 1000, 1819 5th Avenue North, Birmingham, Alabama 35203. The deposition will commence at 1:00 PM before a court reporter and continue thereafter until completed.

Dated: December 14, 2007

Respectfully submitted,

/s/Brian Z. Liss

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Counsel for Defendant, Perdue Farms Incorporated

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Plaintiffs' counsel by Brian Z. Liss, on this 14th day of December, 2007, via electronic mail on:

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NOTICE OF DEPOSITION

Defendant, Perdue Farms Incorporated, by and through its undersigned counsel, hereby notices the deposition of Elisha Jackson for January 4, 2008, at the offices of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., One Federal Place, Suite 1000, 1819 5th Avenue North, Birmingham, Alabama 35203. The deposition will commence at 1:00 PM before a court reporter and continue thereafter until completed.

Dated: December 14, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Notice of Deposition has been served upon
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